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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

WASHINGTON EMPLOYERS)	
CONCERNED ABOUT REGULATING)	
ERGONOMICS, ET AL.,)	
)	
Petitioner,)	
)	
vs.)	
)	NO. 01-2-1935-7
STATE L & I, ET AL.,)	
)	
Defendants.)	

BE IT REMEMBERED that on Friday, July 12,
2002 the above-entitled matter came on for Oral Opinion
by the Court before the HONORABLE PAULA CASEY, Judge of
the Superior Court of the State of Washington, County of
Thurston.
Carolyn M. Koinzan, KOINZCM5050W
Superior Court
2000 Lakeridge Dr. SW
Olympia, Washington 98502
360/786/5571

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A P P E A R A N C E S

TIMOTHY J. C'CONNELL, Attorney at Law,
appearing on behalf of the Petitioner;

ELLIOTT S. FURST, Assistant Attorney General,
appearing on behalf of the State of Washington;

LAWRENCE SCHWERIN, Attorney at Law, appearing
on behalf of AFL CIO.

1
2 FRIDAY, JULY 12, 2002
3

4 THE COURT: Good morning. We are back after
5 the June 28th argument in this matter. This case, of
6 course, comes before the Court on a challenge to the
7 ergonomics rule issued by the Department of Labor and
8 Industries in May of 2000.

9 As counsel well know, a 100,000 page
10 rule-making record was transmitted to the Court in
11 regard to this rule challenge, but the parties
12 themselves designated a much smaller portion of the
13 record for me to review. I have, of course, reviewed
14 the designated part of the record as well as the
15 briefing and heard the oral arguments on June 28.

16 Today I'm going to discuss the standard of
17 review to be applied to this rule-making review. I'm
18 going to discuss the procedural challenges to the
19 timeliness of the filing of the cost/benefit analysis
20 and the implementation plan; I will discuss whether the
21 Department of Labor and Industries has authority to
22 regulate workplace risk factors that cause or contribute
23 to musculoskeletal disorders; I'll discuss whether
24 epidemiological studies may be relied on for these
25 rules; I'll discuss the sufficiency of the cost/benefit

1 analysis and the implementation plan.

2 I will apologize both to counsel and those of
3 you who are spectators that I'm going to stumble over
4 the word epidemiological many times in today's hearing.
5 Can counsel just say the word one time for me?

6 MR. O'CONNELL: Epidomiological.

7 MR. FURST: I concur.

8 THE COURT: First I'll address the standard of
9 review.

10 RCW 34.05.570(2)(c) addresses the standard of
11 review in a proceeding involving a .review of the rule.
12 It declares that the Court shall declare the rule
13 invalid only if it finds that the rule violates
14 constitutional provisions; the rule exceeds the
15 statutory authority of the agency; the rule, was adopted
16 without compliance with statutory rule-making
17 procedures; or the rule is arbitrary and capricious. It
18 is my belief and my finding that this statute governs
19 the Court's review of rule making.

20 However, of course, there is more to the
21 Court's review of a rule. RCW 34.05.328 sets forth
22 requirements that must be complied with in adopting
23 significant legislative rules, which of course this is.
24 In subsection (1) the statute provides that before
25 adopting a rule, an agency shall clearly state in detail

1 the general goals and specific objectives of the statute
2 that the rule implements; determine that the rule is
3 needed to achieve the general goals and specific
4 objectives stated under (a) of this subsection, analyze
5 the alternatives to rule-making and the consequences of
6 then not adopting the rule; determine that the probable
7 benefits of the rule are greater than is probable cost,
8 taking into account both the qualitative and
9 quantitative benefits and costs and the specific
10 directives of the statute being implemented; determine,
11 after considering alternative versions of the rule and
12 the analysis required that the rule being adopted is the
13 least burdensome alternative for those required to
14 comply with it that will achieve the general goals and
15 objectives under this section; and determine if the rule
16 differs from any federal regulation or statute
17 applicable to the same activity or subject matter, and,
18 if so, determine that the difference is justified.

19 In subsection (2) the statute goes on to
20 provide that the agency shall place in the rule-making
21 file documentation of sufficient quantity and quality so
22 as to persuade a reasonable person that the
23 determinations are justified.

24 So, while court review generally is governed
25 by the arbitrary and capricious standard, the Court must

1 also make sure that the statutory rulemaking procedures
2 are complied with, and, specifically, that the
3 requirements of RCW 34.05.328 were complied with to the
4 extent that they have been challenged.

5 In this case, the first major procedural
6 challenge brought by the petitioners is that the
7 Department failed to have the cost/benefit analysis
8 required by RCW 34.05.328 completed and available for
9 public comment prior to the rule's adoption.

10 RCW 49.17.040 sets forth requirements of
11 public notice of rule making for the industrial health
12 and safety. This statute requires publication of the
13 general subject matter of the proposed rules and
14 information for locating copies of proposed rules in
15 order to receive public comment.

16 RCW 34.05.320 and 325 are the Administrative
17 Procedures Act directives governing public participation
18 in rule making. These provisions require publication of
19 proposed rules, prior to rule making hearings, together
20 with information, including, among other specifics,
21 agency comments on implementation and fiscal matters.
22 The agency also has the obligation to assure that
23 information published is accurate.

24 In the case of this ergonomics rule, a brief
25 economic summary, including background discussion and

1 methods used to analyze costs and benefits, was
2 published with the proposed rule in November 1999 and
3 was available for comment.

4 Public comments on the cost/benefit analysis
5 are summarized in Appendix D to the Concise Explanatory
6 Statement. The comprehensive cost/benefit analysis
7 however was filed later contemporaneous with the
8 adoption of the rule :in May of 2000.

9 Although it seems to me that it would be
10 preferable to have the thorough cost/benefit analysis of
11 a proposed rule required by RCW 34.05.328 available for
12 consideration during the period of public comment,
13 nothing in the statute specifically requires that that
14 cost/benefit analysis be completed and available prior
15 to the public comment.

16 In this case, there was in fact public notice
17 of the general cost/benefit analysis of the Department
18 There was, in fact, public comment, on the costs and
19 benefits. The rule gave rise to concerns about costs of
20 implementation and these were specifically addressed in
21 the comment period without the Department's publication
22 of its complete cost/benefit analysis. The Department
23 considered these comments in its final cost/benefit
24 analysis. Whether the documentation concerning costs
25 and benefits placed in the rule making file was

1 sufficient to meet the requirements of k.CW 30.05.328(2)
2 is a separate question. In any case, I do not find that
3 the rule making process was defective due to the timing
4 of the filing of the cost/benefit analysis.

5 Petitioners next argue that the rules
6 Implementation Plan also was not timely filed. Like the
7 cost/benefit analysis, the implementation plan was filed
8 contemporaneous with the rule's adoption in May of 2000.
9 My analysis of this issue is similar to the last one.
10 RCW 34.05.328(3) requires an implementation plan to be
11 placed in the rule making file before the rules are
12 adopted. This requirement was met. I'll address the
13 challenge to the sufficiency of the implementation plan
14 separately.

15 Petitioners have challenged whether the
16 Department is authorized to regulate work-related
17 musculoskeletal disorders, or, at least, they argue that
18 musculoskeletal disorders resulting from workplace
19 factors are not encompassed in the Department's
20 authority in RCW 49.17.050. That statute requires the
21 Director of the Department of Labor and Industries to
22 promulgate health and safety standards and to control
23 conditions in workplaces for "gases, vapors, dust or
24 other airborne particles, toxic materials, or harmful
25 physical agents, and to set a standard which most

1 adequately assures, to the extent feasible, on the basis
2 of the best available evidence, that no employee will
3 suffer material impairment of health or functional
4 capacity, even if such employee has regular exposure to
5 the hazard dealt with by such standard for the period of
6 his working life."

7 The Department and intervenor argue that
8 "harmful physical agents," the language of the statute,
9 give rise to the MSDs. Petitioners argue that what
10 gives rise to MSDs is not a harmful physical agent. I'm
11 not sure who is correct about the meaning of harmful
12 physical agents, but I do analyze the Department's
13 authority to regulate workplace factors contributing to
14 musculoskeletal disorders differently.

15 The purpose of the Industrial Safety and
16 Health Act of Washington is stated in RCW 49.17.010 to
17 create, maintain, continue and enhance the industrial
18 safety and health program of the state. The Director of
19 the Department of Labor and Industries is directed by
20 RCW 49.17.040 to adopt rules and regulations governing
21 safety and health standards for conditions of
22 employment.

23 RCW 49.17.050 (where the harmful physical
24 agent language is found) has more specific directives to
25 the Director of Department of Labor and Industries.

1 I am satisfied that the Department has
2 authority under section 010 and 040 to regulate the
3 conditions of the workplace for the health and safety of
4 workers and that includes those workplace conditions
5 causing or contributing to MSDs. I find that analysis
6 under section 050 is really unnecessary to determine the
7 Department's authority to regulate.

8 Regardless of whether 050 is the source of.
9 authority for the regulation, it was my understanding
10 from the argument that the Department seems to agree
11 that its rule making decision must be based upon the
12 "best available evidence," which is language that is
13 found in 050 and so that too will be a basis for
14 considering the appropriateness of these rules.

15 Petitioners next argue then that the
16 Ergonomics Rules is not based upon the best available
17 evidence Petitioners' primary argument is that
18 epidemiological studies are not the type of scientific
19 evidence required to analyze the need for these rules.
20 I have learned that epidemiology studies the incidence
21 and distribution of diseases or injuries in populations
22 and draws conclusions based on statistical associations
23 between exposure and outcome.

24 Petitioners argue that superior scientific
25 method would involve random controlled trials and that

1 random controlled trials are the best evidence and
2 should be used to support this type of rule making.
3 Petitioners point to some specific random control trials
4 that they argue do not support the Department's
5 conclusion that these rules are needed or that these
6 rules would accomplish the Department's goals.

7 First, let me say that it does not appear that
8 any court has determined that random controlled trials
9 are necessary for determining the need for industrial
10 health and safety regulations: Courts, including the
11 Washington courts in the Aviation West tobacco smoke
12 case, have allowed the use of epidemiological studies to
13 support workplace regulations, particularly with respect
14 to cancer-related causes:

15 In this rule making, the Department reviewed
16 hundreds of epidemiological studies. The Department
17 relied on conclusions of the National Academy of Science
18 Symposium; which was a symposium of apparently 74
19 scientists and the National Institute of Occupational
20 Safety and Health review of hundreds of epidemiological
21 studies. The individual studies vary in their
22 conclusions. Many show an association between MSDs and
23 work-related physical factors when there are high levels
24 of exposure. The Department also considered specific
25 random controlled trials that were identified by

1 petitioners but came to different conclusions about the
2 relationship between the results of those trials and
3 these rules.

4 I am satisfied that the epidemiological
5 studies are appropriate scientifically based studies to
6 use in determining the need for workplace regulations.
7 Epidemiological studies and the few random controlled
8 trials that have been done, together are the best
9 available evidence of the relationship between
10 musculoskeletal disorders and working conditions.

11 The petitioners further argue with respect to
12 the scientific basis for the adoption of these rules
13 that the Department failed to make a dose-response
14 analysis. The Concise Explanatory Statement outlines
15 the reasoning of the Department in analyzing the
16 epidemiological studies and the workplace variables of
17 amount, intensity, duration and frequency of the
18 physical risk factors in the workplace. These studies
19 formed the basis for the specific ergonomics rules
20 related to specific types, amounts and duration of
21 physical risk factors in the workplace and the
22 Department's analysis that reducing exposures as-the
23 rules require will reduce the incidence of injuries to
24 exposed workers.

25 I find that the Department was not arbitrary

1 and capricious in its consideration of the random
2 controlled trial evidence referenced by the petitioners
3 in its reliance on the available epidemiological data
4 and the Department's own workplace injury data,
5 (including statistics that show over 50,000 workers
6 claims for WMSDs each year), or in its analysis of how
7 specific reductions in exposure to physical risk factors
8 would reduce the incidence of MSDs in the workplace. It
9 is not my job to determine whether another person or
10 another agency conducting the analysis could have or
11 would have reached a different conclusion.

12 I'm now going to return to the petitioner's
13 challenge to the sufficiency of the cost/benefit
14 analysis. I believe that this is perhaps the most
15 difficult analysis for the Court to make. The written
16 cost/benefit analysis is a 63 page document with
17 references and survey questions attached.

18 With respect to costs, the Department relied
19 on employer survey data and a federal OSHA study to
20 determine the costs of implementing the rule. The
21 petitioners have argued that the Department's survey was
22 flawed in that the queries about workplace risk
23 exposures are not the same as the physical risk factor
24 exposures that were finally adopted in the Department's
25 rule. Petitioners argue that the employer response rate

1 was low.

2 The Department has countered that there was an
3 unusually high response rate to the survey, in fact,
4 thousands of employers provided input about exposure in
5 their workplaces. The Department argues that
6 discrepancies between the survey questions and the
7 regulation would cause the cost estimates to be higher
8 than they actually will be under the rule that was
9 finally adopted.

10 Petitioners also argue that the Department has
11 relied too heavily on the OSHA study to determine
12 exposure data and unit cost estimates for compliance
13 with the ergonomics rule because the OSHA rules being
14 considered were markedly different than the rule adopted
15 in Washington.

16 The Department counters that although the OSHA
17 regulations differed, the unit cost estimates for
18 particular ergonomic controls are still a valid basis
19 for this analysis and are based upon judgments of
20 experts in the field.

21 With respect to benefits, the Department's own
22 workers compensation claim costs were analyzed.
23 Epidemiological data and reports of 63 ergonomic
24 programs that have been implemented were also analyzed
25 to determine what injuries, and, therefore, what

1 percentage of claims would be avoided by implementing
2 ergonomic regulations.

3 Petitioners criticize the extrapolations done
4 from the local data and question the basis for the
5 estimates of injury avoidance. The Department asserts
6 that the risk reduction estimates are based on the
7 literature which showed a 50 percent reduction but only
8 a 40 percent figure was used by the Department to
9 compute economic savings.

10 All of this analysis led the Department to the
11 conclusion that the costs of implementation would be
12 around \$80 million a year and that the economic benefits
13 would be around \$340 million a year. The projected
14 economic benefits in the department's analysis outweighs
15 economic costs by 4 to 1. This analysis certainly does
16 provide a large margin for error before the Department's
17 conclusion that benefits outweigh costs would be
18 overcome.

19 In addition, the Department expects there
20 would be qualitative social benefits, which the statute
21 requires to be considered. They would include a
22 healthier work force and a healthier quality of life by
23 reducing those negative factors that are known to
24 accompany work-related musculoskeletal disorders such as
25 living with pain, living with depression, reduced

1 long-term earning potential, and loss of family
2 stability. The Department also cites employer benefits
3 such as less absenteeism, less turnover, fewer training
4 costs and better productivity.

5 I am sure that there are many ways of looking
6 at the data, of adjusting, of extrapolating, of
7 discounting. There is no certainty in any of the
8 projections that have been made.. However, I conclude
9 that the Department did accumulate documentation of
10 sufficient quantity and quality to support its
11 conclusion and I conclude that the Department was not
12 arbitrary and capricious to conclude that the benefits
13 of this rule outweigh its costs.

14 Finally, the petitioners challenge the
15 sufficiency of the implementation plan. RCW
16 34.05.328(3) requires putting an implementation plan in
17 the rule making file at the time before adopting the
18 rule. The plan must address how the agency plans to
19 implement and enforce the rule, including a description
20 of the agency resources to be used; how the agency plans
21 to inform and. educate people about the rule; how the
22 agency plans to promote and assist involuntary
23 compliance; and to evaluate and to plan on how the
24 Department will evaluate whether the rule achieves its
25 purpose.

1 The Department's implementation plan addressed
2 each of the four issues required by the statute and the
3 Department was not arbitrary and capricious in adopting
4 a time line for implementation of the rule or means of
5 assisting employers and informing them about
6 implementing the requirements of this rule.

7 Accordingly, I will uphold the rule making
8 process.

9 Are there any other questions? I know that
10 there were lots of smaller issues that were addressed in
11 the briefing and are there other issues that needs to be
12 addressed in this ruling?

13 MR. FURST: I don't have anything, Your Honor.

14 MR. O'CONNELL: Nothing further, Your Honor.

15 THE COURT: Would you like to just agree among
16 yourselves as a time for presentation on a Friday motion
17 calendar or would you like me to set one here in court.

18 MR. FURST: I think we can reach an agreement.

19 MR. O'CONNELL: We should discuss that amongst
20 ourselves, Your Honor.

21 THE COURT: Best time would be a Friday motion
22 calendar.

23 MR. FURST: Thank you, Your Honor.

24 (Proceedings concluded:)

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C E R T I F I C A T E

STATE OF WASHINGTON)
)ss
COUNTY OF THURSTON)

I, Carolyn M. Koinzan, Official Reporter of the
Superior Court of the State of Washington, in and for
the county of Thurston, do hereby certify:

That the foregoing pages compromise a true and
correct transcript of the proceedings held in the
above-entitled matter, as designated by Counsel to be
included in the transcript, reported by me on the 12th
day of July, 2002.

Carolyn M. Koinzan, Reporter
C.S.R. No. KOINZCM5050W